

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE: . Case No. 10-11727-REG  
. .  
PALI HOLDINGS, INC., .  
. .  
Debtor. .  
. . . . .  
BRADLEY REIFLER and . Adv. No. 11-01682-REG  
DAVID WASITOWSKI, .  
. .  
Plaintiffs, .  
v. .  
. .  
CERTAIN UNDERWRITERS AT .  
LLOYD'S, LONDON, .  
. .  
Defendants. .  
. . . . .  
PALI HOLDINGS, INC., . Adv. No. 10-03533-REG  
. .  
Plaintiff, .  
v. . One Bowling Green  
. New York City, NY 10004  
LLOYDS OF LONDON, .  
. .  
Defendants. . September 20, 2012  
. . . . . 12:25 p.m.

TRANSCRIPT OF DISCOVERY DISPUTE AND STATUS CONFERENCE  
BEFORE HONORABLE ROBERT E. GERBER  
UNITED STATES BANKRUPTCY COURT JUDGE

Audio Operator: Jeanelle

Proceedings recorded by electronic sound recording, transcript  
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Trustee of Pali Capital  
and Pali Holdings, Inc.:

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1 THE COURT: All right. Going on to Pali Holdings.  
2 Let me get appearances and then I'd like everybody to sit down.

3 MR. SMITH: Good morning, Your Honor. This is  
4 Gregory Smith for plaintiffs Bradley Reifler and David  
5 Wasitowski. I'm joined by my colleague Douglas Schneider to my  
6 left.

7 THE COURT: All right. That's Mr. Smith and your  
8 colleague's name is Ms. Schneider -- or your name is Schneider.

9 MR. SMITH: Mr. Schneider, yeah.

10 MR. SCHNEIDER: S-c-h-n-e-i-d-e-r.

11 THE COURT: All right. Thank you, Mr. Schneider.

12 MR. SCHNEIDER: Thank you, Your Honor.

13 MS. ZAVALKOFF-BABEJ: Good morning, your Honor. Erin  
14 Zavalkoff-Babej representing the Chapter 7 Trustee of Pali  
15 Capital and Pali Holdings.

16 THE COURT: Forgive me, your last name again?

17 MS. ZAVALKOFF-BABEJ: Zavalkoff.

18 THE COURT: Zavalkoff. Okay. Okay.

19 MR. WALSH: Philip Walsh for the defendants and my  
20 colleague and partner John Coulter.

21 THE COURT: All right. Mr. Walsh, you used the words  
22 defendants, I assume you're the Lloyd's Underwriters?

23 MR. WALSH: Yes.

24 THE COURT: Okay. All right. Folks, I have reviewed  
25 the various letters, and it appeared principally from Mr.

1 Walsh's letter which was in the middle of the sandwich that  
2 some of the issues are moot, maybe many of them are moot. My  
3 view, again my tentative California style, is that requiring  
4 somebody to put up a 30(b)(6) witness when the witness wouldn't  
5 know anything is stupid and is a waste of everybody's time and  
6 I would be disinclined to order that. It looked like the  
7 documents in the privileged list have either been wholly or  
8 substantially now provided.

9           So, Mr. Smith, I know you were looking for relief. I  
10 need you to tell me what's still on the table and then I'll  
11 hear first from you and then Mr. Walsh and let's see what's  
12 still up in controversy.

13           MR. SMITH: Well, I'm very confused by what Your  
14 Honor has concluded from the correspondence. I know of nothing  
15 that's mooted. I know that Mr. Walsh has made the contention  
16 that there's nobody at the managing agent for the lead  
17 underwriting syndicate who has direct personal knowledge.

18           THE COURT: Then nobody at the syndicate can testify  
19 to claim any facts that you may want to prove and they may have  
20 a harder time refuting you, but how could you make knowledge  
21 come out of the air?

22           MR. SMITH: They have a claims file which has  
23 significant documents in it. They --

24           THE COURT: I thought their claims file was produced.

25           MR. SMITH: It was not produced. I do not have a

1 claims file. I've never been produced a claims file. What  
2 I've been produced is correspondence between Pali Holdings or  
3 representatives of Pali Holdings and Illinois counsel, coverage  
4 counsel, who did the claims investigation, but what I don't  
5 have is, for instance, any documents between coverage counsel  
6 in Illinois and the Underwriters in London, not giving legal  
7 advice, but documenting the investigation, the facts that were  
8 learned, the requests that were made to the insureds that  
9 allegedly were not fulfilled.

10 I mean one of the things that Underwriters has done  
11 here is that they've thrown a bunch of non-coverage affirmative  
12 defenses on the wall to see what will stick, one of them is a  
13 breach of the cooperation clause and there are several subparts  
14 related to that defense, one that the person seeking coverage  
15 here, as well as Pali, deprived the Underwriters of the ability  
16 to mount a defense because they retained their own counsel.  
17 They did so of course. What they don't say is that they  
18 retained this counsel with the blessing and consent of the  
19 coverage counsel in Illinois.

20 But one of the other things they state as a breach of  
21 the cooperation clause is that Pali did not provide information  
22 that was requested. The -- if they're going to make that  
23 defense I'm entitled to depose somebody who can give me the  
24 facts underlying that defense. And so --

25 THE COURT: Now, Roberts is available as a third

1 party witness or would at least seemingly be available as such,  
2 right? James Roberts?

3 MR. SMITH: He's no longer employed, but --

4 THE COURT: Big deal. Why does that matter?

5 MR. SMITH: It doesn't matter to me. That's --

6 30(b)(6) says you can designate anybody, you can hire a third  
7 party. So that's why --

8 THE COURT: Well -- look, all of us have been  
9 litigators at one time or another. I was a litigator for 30  
10 years before I started this job. In most cases 30(b)(6) is a  
11 quick, clean procedure because there's somebody still at the  
12 opponent who knows something about what's going on.

13 MR. SMITH: Your --

14 THE COURT: But there are cases when the 30(b)(6)  
15 witness would either have to educate himself or herself or even  
16 that would be useless. Now, I've never been a fan of the  
17 30(b)(6) witness educating himself or herself, but if parties  
18 are happy with that that's fine, but the best evidence is by  
19 the people who know what happened, and if there is nobody on  
20 behalf of the syndicate who has first-hand knowledge, well Mr.  
21 Walsh may have deal with that down the road, but he can't make  
22 a witness with knowledge materialize out of thin air.

23 MR. SMITH: Well, I submit, Your Honor, that that's  
24 exactly what's going to happen here. That Mr. Walsh will put  
25 somebody up, either it will be coverage counsel from Illinois

1 or it will be someone he educates at Brit because he does have  
2 the materials to educate a witness, he just hasn't done it and  
3 that person --

4 THE COURT: Wouldn't that at least seemingly be  
5 whatever that witness said be hearsay?

6 MR. SMITH: Potentially. Potentially, but not if  
7 it's not if Mr. Hanson (phonetic), the coverage counsel from  
8 Illinois, who refused to sit for his deposition. I expect that  
9 there will be an affidavit presented from Mr. -- signed by Mr.  
10 Hanson which will attempt to introduce all the facts underlying  
11 their defense based on lack of cooperation, based on breach of  
12 the warranty clause. There's a contention that the CEO of Pali  
13 when he signed the application for insurance knew a whole bunch  
14 of things that weren't disclosed.

15 They -- Your Honor, 30(b)(6), now I maybe naive about  
16 this, but the case law says if you don't have somebody with  
17 personal knowledge at the organization it's not optional. You  
18 have to educate someone and if you have the documents to do it,  
19 if you have -- if outside counsel has knowledge then that's  
20 where you get it from. You have to -- the witness, whoever you  
21 designate, has to sit down, review binders, review the relevant  
22 documents. If there's anybody in the institution that does  
23 have personal knowledge about this or that aspect you interview  
24 them and you learn what -- but --

25 THE COURT: And do any of those cases say that the

1 Court should order that even when it would be a useless  
2 exercise?

3 MR. SMITH: I -- but how have we established that  
4 that would be --

5 THE COURT: The underlying documents producibility  
6 that would be reviewed by such a 30(b)(6) witness is a very  
7 separate issue. That goes to relevance. It goes to  
8 attorney/client privilege to the extent there is any such, and  
9 it goes to work product and attorney mental impressions to the  
10 extent those are discoverable or discoverable under  
11 extraordinary circumstances, but --

12 MR. SMITH: Well --

13 THE COURT: -- you're telling me that I have to  
14 direct your opponent to educate a witness when the witness  
15 knows nothing and to order it. If you have a case that tells  
16 me that, I would like to read it because I've been doing this  
17 for 42 years and I've never seen it.

18 MR. SMITH: Mr. Schneider will address that.

19 MR. SCHNEIDER: Your Honor, if I might the -- Brit  
20 Insurance has asserted defenses in the case. If they have  
21 nobody to assert those defenses then the defenses should be  
22 struck. If you assert defenses that require a factual basis  
23 then if you don't -- who is that filed the answer in this --

24 THE COURT: Forgive me, Mr. Schneider, the rule of  
25 law is not what you stated, is that affirmative defenses must

1 be proven. They must be proven by one means or another.

2 MR. SCHNEIDER: But you need a good faith basis to  
3 assert them, Your Honor.

4 THE COURT: Forgive me, you don't argue with me.

5 MR. SCHNEIDER: I apologize.

6 THE COURT: Yes, and if the good faith basis is not  
7 apparent from other evidence in the case we can deal with that  
8 at an appropriate time, but there are an array of mechanisms by  
9 which facts may be proven. They may be proven by documents.  
10 They may be proven by third party witnesses. They may be  
11 proven by taking an opponent on adverse direct. I have ruled  
12 on this issue or if I haven't made it clear that I've ruled on  
13 this issue I'm making it clear now. Let's move onto the areas  
14 where you guys have stronger points.

15 MR. SMITH: Well, Your Honor asked for case citations  
16 related to 30(b)(6) deponent's obligation to educate a witness  
17 who had no prior knowledge. I can give you two right now, QBE  
18 Insurance Corp. v. Jorda Enterprises which is cited in all the  
19 treatises as one of the most succinct and authoritative  
20 descriptions of a 30(b)(6) deponent's obligations to designate  
21 a witness and educate that witness in order to testify on  
22 behalf of the organization. I mean the purpose of the rule was  
23 to prevent bandying so that defense counsel --

24 THE COURT: To prevent what?

25 MR. SMITH: What is called bandying, where you bandy

1 the plaintiff's attorney or the attorney trying to take a  
2 deposition from one person to another who disclaims personal  
3 knowledge about this or that fact in dispute and then you have  
4 to notice somebody else's deposition and guess -- try to guess  
5 who within the organization would have personal knowledge of  
6 that. 30(b)(6) is an attempt to stop that practice and --

7 THE COURT: Well, I understand that, but if the  
8 lawyer on the other side steps up to the plate and says I don't  
9 have anybody I don't see how anybody is being bandied, is that  
10 the word?

11 MR. SMITH: Bandied, to bandy someone from one person  
12 to another. It's called bandying. That's what it's referred  
13 to in the treatises and the case. That citation is 277 F.R.D.  
14 676. It's a Southern District of Florida case. There's  
15 another Great American Insurance Company of New York v. Vegas  
16 Construction Company 251 F.R.D. 534. Your Honor, if you were  
17 to open Wright and Miller or Moore's Federal Practice on  
18 30(b)(6) it would tell you exactly the same thing.

19 Yes, they do have an obligation to -- if they have  
20 the ability -- I'm not asking them to designate a witness to  
21 testify about the Mars Rover. What I'm asking them to do is to  
22 designate a witness who is going to be able to tell me what  
23 they contend the facts are that underlie their affirmative  
24 defenses. And they, as Mr. Schneider said, presumably at one  
25 point they knew these facts because they had to have a good

1 faith basis to plead these affirmative defenses, and they have  
2 slightly answered interrogatories by referring to certain  
3 documents where we can go looking for these facts, they say.

4           So they do have through the documents in their  
5 possession, through interviewing their coverage counsel in  
6 Illinois, et cetera, et cetera, they do have the ability to  
7 marshal these facts, designate one or more witnesses, educate  
8 those people and let me figure out what the organizational  
9 contentions are.

10           Mr. Walsh made the very generous offer that I could  
11 use Hague Convention procedures to go chasing people who used  
12 to work there who he didn't know where they were and so -- but  
13 that's exactly the sort of thing that 30(b)(6) is designed to  
14 protect against. It's not -- I really don't care who  
15 testifies. I'm not concerned about the person who has personal  
16 knowledge. What I'm concerned about is what does -- what are  
17 the organization's contentions in this litigation related to  
18 the facts underlying their affirmative defenses, the  
19 contentions they make about the most basic interpretations of  
20 the policy here. I couldn't get them to answer those  
21 questions.

22           They -- neither one of their witnesses for the lead  
23 underwriter or the following underwriter would tell me what  
24 they consider the claim as defined in the policy to be here.  
25 How can I prepare a defense when in the first instance the guy

1 says I have no idea because I've never reviewed any document  
2 related to this case and the second guys wouldn't -- Mr. Walsh  
3 wouldn't allow him to answer because he said that's  
4 attorney/client privilege? How can I prepare a defense when I  
5 don't even know what they think the claim in -- for coverage  
6 under this policy is?

7           And the policy defines a claim either as a lawsuit or  
8 a written demand for damages, a written demand for relief made  
9 against an insured. So it does not have to be a lawsuit, and  
10 we have -- in the history of this litigation we have written  
11 demands for relief made against my clients. So -- and I can't  
12 get the Underwriters to take a position as to what they  
13 consider the claim under their own policy to be. So I don't  
14 see how I can prepare a defense for trial when I have to guess  
15 as to what their position is going to be.

16           Now, I do have a recommendation for getting this all  
17 off the table and let's go trial. If they want to withdraw --  
18 they've basically admitted, at least for strategic purposes for  
19 today's conference, that they have no way of coming up with  
20 this knowledge to educate a witness to sit for a 30(b)(6)  
21 deposition. Okay. Well, then withdraw the defense, don't put  
22 any evidence in support of those affirmative defenses and let's  
23 just argue about coverage which is what we should have been  
24 doing from the very beginning.

25           Let's -- what this case I believe will come down to

1 is does the insured versus insured exclusion eliminate coverage  
2 for my client's claims, and does the allocation clause at least  
3 bring back coverage to the extent that some of the claimants  
4 were not insured under the policy, so that some of claims were  
5 asserted by non-insureds against insureds? Admittedly there  
6 were claims asserted by insureds against insureds.

7           What I think the case will come down to and what Your  
8 Honor will be asked to decide is a pure question of law. How  
9 do you interpret the insured versus insured exclusion and does  
10 the allocation clause -- if the exclusion applies does the  
11 allocation clause give back some proportion of coverage? I  
12 think that's at the end of the day what this case will revolve  
13 around.

14           So if they don't have any way to educate a witness to  
15 sit for a 30(b)(6) deposition to testify about facts related to  
16 their claim that there was a breach of the warranty clause, to  
17 testify about the facts to underlie their defense that there  
18 was a breach of the cooperation clause then withdraw those  
19 defenses and let's get to coverage, and I don't need to depose  
20 anybody at that point, but the only reason I'm asking to depose  
21 the entity, the managing agent which was in charge of the  
22 claims handling, is if anybody knows they do. They hired  
23 counsel in Illinois to conduct a claims investigation. They  
24 won't let him sit for a deposition. They won't produce any of  
25 his documents related to -- let him produce any of his

1 documents related to the claims investigation. I have no way  
2 of preparing for those defenses. They're --

3 THE COURT: You're getting very, very repetitious,  
4 Mr. Smith.

5 MR. SMITH: I understand.

6 THE COURT: Move onto your next point.

7 MR. SMITH: The -- well, I mean the other points are  
8 minor in comparison. I mean -- and they turn somewhat on  
9 whether Your Honor is going to take a position or not about  
10 whether they can actually put up witnesses at this point to  
11 testify in favor of these -- in support of these affirmative  
12 defenses. If they can what I would like to do is, either today  
13 or get permission from Your Honor to make a motion, to  
14 demonstrate that the legal authority is extremely clear.

15 When an insurance company hires counsel to conduct a  
16 claims investigation, two things flow from that. Any documents  
17 that that counsel generates prior to the insurance company  
18 making a determination that there is no coverage and  
19 communicating that no coverage declamation to the insured  
20 cannot be claimed as work product because before the insured  
21 denies coverage there is no dispute that could reasonably lead  
22 to litigation. That's true both in New York and it's true both  
23 in Illinois where Underwriter's coverage counsel is based.

24 The other very clear proposition from the  
25 authorities, both in New York and Illinois, is that any

1 documents, any correspondence between the coverage counsel  
2 who's doing the claims investigation and the insurance company,  
3 is not protected by the attorney/client privilege unless the  
4 coverage counsel is providing legal advice to the insurance  
5 company about what it should do, what position it should take,  
6 but communications that -- from counsel to the insurance  
7 company that are reporting the facts that the counsel has  
8 learned, the steps that the counsel has taken to figure out --  
9 to request information from the insured, to document  
10 information received from the insured, all of that is not  
11 covered by the attorney/client privilege because the lawyer is  
12 acting in the same capacity as an in-house claims adjustor  
13 would be acting for an insurance company and you can discover  
14 those communications in-house when they're performed by an  
15 employee of the insurance company. And the Courts have taken  
16 the position that you don't exempt yourself from that sort of  
17 discovery simply by virtue of hiring a lawyer to handle claims  
18 investigation.

19           And there are tons of documents on the newly revised  
20 privilege log that we received on -- late on September 18th  
21 that now list documents that were listed originally on the  
22 privilege logs produced by Illinois counsel. And so what I  
23 would like to do is figure out someday -- if again we're going  
24 to be litigating issues concerning what happened during the  
25 claims investigation process what I would like to do is figure

1 out somehow to get a ruling from the Court and even if involves  
2 an in camera inspection of documents listed on the privilege  
3 log whether there are documents there that simply document  
4 counsel's claims investigation and either don't relate to or  
5 can be redacted to remove legal advice that may also be  
6 contained in those communications.

7           And there are about a dozen documents, even more,  
8 that have been withheld on the basis of the work product  
9 doctrine which were generated prior to November 25th, 2008,  
10 which is the date that the insurance company communicated no  
11 coverage to Pali. So the -- there's a bright line in the cases  
12 that says no work product protection at all, not even arguable,  
13 for documents generated prior to communication of the insurer's  
14 decision to deny coverage, and they're still withholding them,  
15 both counsel in Illinois and Mr. Walsh, and refused to produce  
16 them. I -- you know, I've provided case authority on that.  
17 I've never received any argument back that suggests that  
18 authority is not applicable, that I'm misinterpreting it, no  
19 citation of contrary authority. It's just been ignored.

20           So, you know, I -- again, I think what will happen is  
21 that Your Honor will be presented with an affidavit signed by  
22 Mr. Hanson, coverage counsel in Illinois, and if that's going  
23 to happen I think the rules entitle me to not only depose him,  
24 but to get a document production from him that is consistent  
25 with the obligations, discovery and disclosure obligations, as

1 interpreted under the Federal Rules of Civil Procedure. The --  
2 Doug, do we have any other issues?

3 MR. SCHNEIDER: (No audible response).

4 MR. SMITH: Mr. Walsh served responses to our request  
5 for admit -- the request to admit were served on May 22nd. I  
6 pointed out their failure to respond within 30 days in my  
7 letter of September 13th. Those responses were first -- first  
8 reached me in late September 18th attached to Mr. Walsh's  
9 letter. They offer no explanation for why they didn't respond  
10 within 30 days. I think it's pretty much automatic that the  
11 request for admissions should be deemed admitted in their  
12 entirety. Anything else, Doug?

13 MR. SCHNEIDER: (No audible response).

14 THE COURT: All right. Mr. Walsh?

15 MR. WALSH: There's no motion made in terms of the  
16 request for admission, but they were -- we responded to them  
17 and we admitted 80 percent of them.

18 THE COURT: Why didn't you respond on time?

19 MR. WALSH: Well, because we didn't, Your Honor, and  
20 we apologize for that and I'll tell you this case -- first of  
21 all, I want to say, you used the word fragging twice. That  
22 does take me back 40 years, and so I'm going to ask that -- and  
23 I wrote this down when you said that, we get a direction from  
24 the Court that counsel cease and desist from writing  
25 vituperative incandescent letters to the Court. So with --

1 THE COURT: Well, frankly, Mr. Walsh, both sides are  
2 getting me a little, I won't use the original word I was going  
3 to use, annoyed. Deadlines exist for a purpose. If you can't  
4 meet your deadline you call up your opponent and you ask for  
5 extra time. I've never been a fan for request for admission,  
6 but you can't just ignore them.

7 MR. WALSH: No, no, I understand that, Your Honor,  
8 and I tell you we apologize for that and he's got them, and if  
9 there's anything I can do to make it better -- I mean I didn't  
10 resist it. When I did respond to them they responded in the  
11 fashion that they ought to be, namely, I admitted -- I think  
12 there's 15, I admitted 13. So I mean, you know, if they're  
13 deemed admitted they're admitted, but, you know, I'm not hiding  
14 anything.

15 And in terms of -- the other thing I want to add  
16 before I make a brief commentary because I don't think I need a  
17 lot is the trustee's counsel which has far more financial stake  
18 in the result of this case has not once joined in the  
19 activities of the counsel for Reifler and Wasitowski who are  
20 chasing their legal fees. There's far more financially at  
21 stake by the trustee. She has not -- they have not -- Fox  
22 Rothschild has not joined in at all and that speaks volumes as  
23 far as I'm concerned.

24 Now, in terms of the case itself I've been litigating  
25 for 35 years over that, insurance coverage. This case involves

1 the underlying pleadings, the litigation, the motions, the  
2 depositions that were taken in the underlying. It's not like a  
3 fact investigation where you go out and you have some kind of a  
4 fidelity bond claim where you look at the facts and  
5 circumstances. It's all there in the pleadings, it's there,  
6 and you apply the policy wording to those underlying issues.  
7 Then you also look at the cooperation and the other issues, but  
8 that's developed. Once it's there it's there and you apply the  
9 applicable law.

10 Now, from a practical standpoint the internal e-mails  
11 between James Roberts who was the lead on this from day one and  
12 who left -- and I told in my answers to the interrogatories, my  
13 responses, I said he's no longer there. He was involved, and  
14 the question in the interrogatories was very specific. They  
15 want to know the names of those individuals who materially  
16 participated in the making of the decision to deny coverage.  
17 That was a specific request in the interrogatories. I  
18 responded. I said, James Roberts, Jamie Fleming, Keith Hanson  
19 in Chicago and Tordie (phonetic), the latter two are lawyers.

20 I also said in my answers to the interrogatories that  
21 Roberts was no longer there. He hasn't been in Brit in a year.  
22 I revised my -- in the interim between my revision of the  
23 answers to the interrogatories and the initial service of the  
24 answers to the interrogatories, I had a telephone call with  
25 counsel and I did say over the phone where James Roberts was

1 and I said it was Barbican Insurance Company in London, and  
2 then I said several times, look at, use the Hague Convention,  
3 you know, he's there. He's not going anywhere.

4 THE COURT: You don't need the Hague Convention for  
5 taking a deposition in the U.K., do you?

6 MR. WALSH: I think -- I'm not sure, Judge, because I  
7 never did it. I mean I never did a third party witness, but he  
8 was there. He could have -- I mean counsel could have looked  
9 into it. All of the documents, all of the e-mails which I've  
10 identified, and I'll get to that, all have James Roberts' name  
11 on them.

12 I then followed up in my responses, my revisions,  
13 saying Debra Allan was now handling this claim. She was a  
14 senior claims examiner, the same as Roberts before he left. I  
15 also said in my answers to interrogatories that the only thing  
16 she knows about this file is from the lawyers. So most or if  
17 not -- most I think I said, most of her testimony will be  
18 privileged. Nothing happened.

19 There was -- you know, and then we decided on  
20 depositions. Deposition of Fleming was going to be on the  
21 16th, Allan was on the 15th, Wednesday. On that Wednesday  
22 before they called me from Brit and said she'd left the company  
23 and there was no one there except for David Gillis who was her  
24 -- sitting next to her I suppose, I mean not physically, but in  
25 terms of seniority and that he was on vacation, but he would

1 step up. I immediately advised counsel that there was a change  
2 and David Gillis would be the witness.

3 I met David Gillis on Tuesday before the deposition  
4 for a couple hours and I met him on Wednesday morning because  
5 the deposition started at one. All he -- the only information  
6 he got, whether he's a 30(b)(6) or otherwise -- first of all,  
7 he wasn't -- he had no material participation in the making of  
8 the decision to deny coverage and, secondly, he learned it from  
9 me.

10 Now, it's all I can -- and I told -- and you'll see  
11 on my letter I said during the deposition or when it started  
12 that, look at, there's no way on earth that we can produce  
13 anybody that knows the facts in this case and I mean, you know,  
14 I told --

15 THE COURT: How are you going to prove your  
16 affirmative defenses --

17 MR. WALSH: I'll show you how.

18 THE COURT: -- Mr. Walsh?

19 MR. WALSH: It's simple. We prove it from the  
20 conduct of the plaintiffs. That's how we do it. There are  
21 letters from the insurance lawyers to -- which I've produced  
22 obviously, to the -- both the trustee's lawyers --

23 THE COURT: Insurance lawyers for whom?

24 MR. WALSH: For the Underwriters, the coverage  
25 lawyers, where they denied the claim. There was -- there's --

1 there must be three inches, two inches, three inches of  
2 documents, correspondence going back and forth from the lawyers  
3 to the representatives and lawyers of Pali and Reifler and  
4 Wasitowski. They're there. They were taking a position --  
5 they were telling them, that is to say the plaintiffs, in 2008  
6 the deficiencies. They were telling them that. And how did  
7 they know it? From what they -- from the documents. There's  
8 no -- what he said, you're hiding the ball, there's no hidden  
9 ball here.

10 As a matter of fact the -- all of the -- and to be as  
11 candid as I can with the Court, all of the 11 letters that went  
12 from the Hanson firm and then one from Tordie and the  
13 litigation was ongoing, all involve legal recommendations based  
14 upon the law because they had the underlying litigation. They  
15 had I assume access to the depositions given. They had the  
16 motions. They had the affidavit of Helen Mogul (phonetic) on  
17 the one hand and Thomas Morland (phonetic) on another where  
18 they were talking about this internecine warfare. And, indeed,  
19 what I did is in my answers to the interrogatories when they  
20 asked me on what basis do you deny the claim or on what -- I  
21 recited everything. Nothing is going to change, it's that.

22 And I'm quite happy if the Court wants to, is to give  
23 these documents to any third party and say you give Mr. Smith  
24 those portions of the 11 reports which you reckon and deem not  
25 to be privileged. I mean the whole thing is privileged. It's

1 legal issues with recommendations.

2 THE COURT: There's a distinction, as Mr. Smith  
3 pointed out and in this respect I was inclined to agree with  
4 him, between providing legal advice based upon your legal  
5 analysis and a lawyer going out as an investigator and  
6 gathering up facts from the outside world and relaying them to  
7 its colleague.

8 MR. WALSH: That's why I wanted to distinguish that  
9 as you've just articulated it to what we've got here. This is  
10 not a situation where you've got a fidelity bond claim with a  
11 bank where the lawyer goes out and investigates all of the  
12 various intricacies that caused the defalcation and then writes  
13 an opinion to the client. These -- the opinions that were --  
14 the opinions that these lawyers wrote, I've read them, all have  
15 to do with the underlying litigation and the documents. As a  
16 matter of fact all of the documents produced to me both by --  
17 literally 99 percent by both the trustee and Mr. Smith are the  
18 underlying pleadings and that's what we have. That's what I've  
19 produced.

20 Now, he wanted me to go back further. When we came  
21 back from the depositions we came back on -- they were done on  
22 the 17th, I came back to New York. On Monday I got an e-mail  
23 from Mr. Smith saying he demanded a privilege log, and I wrote  
24 back, I said, well, you never gave us one. So, you know, we  
25 bandied this back and forth for about -- and then -- oh, and

1 then we Reifler and Wasitowski's depositions. So on Friday  
2 night, the 24th, I get five pages -- five documents identified  
3 as a privilege log. Well, then I did my homework. I wrote and  
4 identified, and with specificity, the length the document, the  
5 date and the subject matter of each one of the 11 reports sent  
6 to the Underwriters. That wasn't good enough. He wanted more.  
7 He said, you know, you're -- Jamie Fleming said that there were  
8 e-mails going back and forth, I want all those.

9           So this past week I've gone over all of the documents  
10 that I have at all, and there are covering e-mails from Joanne  
11 Fercano (phonetic), who is an associate attorney at Hanson's  
12 firm, attaching their reports, back and forth communications,  
13 so and so is on holiday, sorry, but he -- you know, he agrees.  
14 I identified all that for the sake of good order.

15           And when the Court hears that we didn't produce the  
16 claims file, of course we did. I produced everything that was  
17 given to me that the lawyers had in Chicago. I didn't produce  
18 their work product. I didn't produce their legal analysis. I  
19 didn't produce their recommendations.

20           THE COURT: There are three separate things here, Mr.  
21 Walsh, and we can't blend them together. The first is the  
22 legal advice that a client -- that a lawyer provides to his  
23 client or in certain instances what a client provides to the  
24 lawyer for the purpose of providing legal advice.

25           MR. WALSH: Right.

1 THE COURT: But here you have the attorney's side  
2 doing the investigation. Then there are attorney mental  
3 impressions which are normally privileged under all  
4 circumstances, technically not privileged, but protected.  
5 Third, there is work product which are facts that the attorney  
6 or an agent of an attorney gathers up which can be produced  
7 under an appropriate showing of need.

8 MR. WALSH: Right.

9 THE COURT: And with -- especially with Roberts being  
10 difficult to reach you're exposed especially on the third.  
11 Now, isn't your opponent entitled to get production of your  
12 work product or at least scrutiny by a judge after the  
13 determining that there is no suitable alternative way for your  
14 opponent to get that stuff?

15 MR. WALSH: First of all, I have no problem with  
16 producing any of this to the Court and let them make up their  
17 own mind. That's -- I'm happy with that. These letters are  
18 not fact investigations. They're a recitation of the  
19 underlying pleadings which is what I got which is what the  
20 trustee gave me which is what my clients had and which is what  
21 the lawyers had. I mean I did a little bit more. I've gone  
22 through discovery in this case. They didn't do that, but I've  
23 done it. I have no problem -- I'm not hiding a thing. If the  
24 Court wants to see all 11 reports with recommendations and all  
25 of the communications I just think it's a waste of time.

1 Now, in terms of the documents that they relied upon,  
2 it was the pleadings. And he was absolutely right, you know,  
3 this is going to probably come down to -- it's nuance, but it's  
4 insured versus insured and it's --

5 THE COURT: But you're making an additional claim.  
6 Forgive me, Mr. Walsh, but you're making an additional claim  
7 that your guys were defrauded into providing coverage or  
8 continuing coverage.

9 MR. WALSH: That --

10 THE COURT: And putting aside the means by which that  
11 information should be conveyed --

12 MR. WALSH: Right.

13 THE COURT: -- would you agree that you've got to let  
14 Mr. Smith know the ways by which you're contending that your  
15 client was sucked in?

16 MR. WALSH: Yeah, I will, and I'll tell you right  
17 now, very simple. Reifler testified that he had problems with  
18 Cohen going back to 2001 when they had EURAM. They were both  
19 investors. Reifler threw in \$300,000 for two percent interest.  
20 Cohen was a big investor in EURAM. It was a Viennese bank that  
21 they brought as an investment vehicle. According to Cohen --  
22 according to Reifler, Cohen and he were also partners in this  
23 company called Pali Capital which was a broker dealer. Reifler  
24 put in a million. Cohen put in good will. In 2007 there was  
25 going to be what they called a reorg which is a transfer of all

1 the EURAM shares to Pali Holdings, and my point is this that  
2 when Reifler testified, he said he had problems going back to  
3 2005 as to where some of these shares and Capital Holdings  
4 popped up from. And that's the reason he was calling Cohen a  
5 crook and a money launderer, and he said, I had concerns about  
6 this. I was asking Freedman (phonetic), our lawyer, and he  
7 never gave me real answers.

8           Now, then there was the question of the Fifth  
9 Amendment that Reifler took in the December 18th deposition in  
10 2008. There was a proxy agreement which he on two separate  
11 occasions during his testimony represented that he was given  
12 and the voting rights for those shares represented in a proxy  
13 statement were sent to him by a fellow named John Staddon who  
14 was a shareholder in EURAM and subsequently in Capital  
15 Holdings. And he was very vociferous in his deposition, very,  
16 very colorful as he was with me, that he had this and he voted  
17 it.

18           So then -- that's September, October. December 18th,  
19 2008, he's examined. He repeatedly take the Fifth Amendment as  
20 to whether or not he forged Staddon's signature. That proxy  
21 agreement and those negotiations about that proxy took place in  
22 March and April -- March of 2007. The application for  
23 insurance was signed on June 21, 2007.

24           Staddon testified in the same underlying litigation  
25 and unequivocally said, I never gave him my voting rights. He

1 never agreed to forgive a debt that I had. So it seems to me  
2 that everyone's interested, you know, in this and if someone  
3 says I took the Fifth Amendment and a document -- about a  
4 document in 2007 and I'm filing an application for insurance  
5 and I know of no facts or circumstances which would even bring  
6 a claim.

7           The second thing is he also testified at his  
8 deposition that he had concerns about Cohen and others, and  
9 there was considerable interest in outside investment bankers  
10 and banks to buy, this is just about the time of the reorg,  
11 Capital -- Pali Capital. He then at some point commissioned  
12 Kroll (phonetic) & Associates to do an investigation. Now, the  
13 time line is not clear because we haven't seen the Kroll report  
14 or the correspondence leading up to it, but my suggestion is  
15 that those are information material to any underwriter.

16           Now, I'm going to get to the \$60,000 question. Mr.  
17 Smith only sought witnesses who had material -- materially  
18 participated in the making of the decision to deny the claim.  
19 I've been involved over 30 years in coverage litigation and  
20 usually I represent brokers, they never examine the claims  
21 people because it's after the fact. These people aren't  
22 lawyers over there. Their internal notes between the two of  
23 them are meaningless. They hire lawyers, they do the  
24 investigation, and on these very sophisticated legal issues  
25 they have to. That's what Jamie Fleming said at his

1 deposition, I'd ask -- I'd go to the lawyer.

2 Well, he also was asked a question about, well, what  
3 if you had a question about the underwriting, the wording? I'd  
4 go to the underwriter. In my 30 years -- 35 years of doing  
5 insurance work, I represent brokers mostly, they never -- the  
6 claims people are throw-ins. What they want is the broker's  
7 file. These wordings are negotiated. They call them bespoke.  
8 A lot of them are negotiated, but the broker has the file on it  
9 and then they depose the underwriter because this is not a  
10 legal issue. This is long before there's any legal issues  
11 involved. There's no litigation in sight. They're the ones  
12 that do the wordings and they are -- I -- my experience is that  
13 they're entitled to ask, not legal questions as such,  
14 aggressive legal -- but they're entitled to ask what the intent  
15 of the wordings is. So I think he missed the ball here. I  
16 didn't hide the ball, but I think he missed the ball.

17 So -- and I also got the distinct impression this  
18 race out to Chicago to put these two lawyers through the  
19 tortures of the dam threatening sanctions against them. He  
20 subpoenaed Lloyd's America over on Fifth Avenue. They're a  
21 service company. That shook up Lloyds. He then deposed  
22 Lloyd's itself. I mean, you know, so --

23 THE COURT: You mean the Society of Lloyd's?

24 MR. WALSH: Yes, and they had -- they put witnesses  
25 up there for them. So it just seemed to me that time was

1 running away. You know, you manage your litigation. The  
2 discovery deadline had been adjourned per your order to the  
3 27th of August. Time was running out, and I think that the --  
4 with the greatest of respect I think he may have seen this  
5 slipping by and that's when he wrote on Wasitowski's deposition  
6 -- and poor Ms. Blume (phonetic) had to call and, you know, you  
7 were on vacation and, you know, he wanted the discovery  
8 continued and that's, I think -- I mean that was my visceral  
9 reaction from being a litigator for a lot of years that, hey,  
10 you know, he wants more time.

11 But I just think that, you know, to put these people,  
12 to put the Society of Lloyd's, I mean they know nothing about  
13 this, he wanted to know whether they have policy wording. I  
14 mean it just went on and on. It was terrible. I didn't -- I  
15 wasn't involved it, but, you know, it shook them up because  
16 they have a reputation here.

17 THE COURT: All right. Mr. Walsh --

18 MR. WALSH: Okay.

19 THE COURT: -- you've been a lot of stuff --

20 MR. WALSH: Okay.

21 THE COURT: -- most of which is on the merits.

22 You've made a number of factual assertions vis-a-vis the things  
23 that you would say by reason to support your contention that  
24 the Lloyd syndicate was defrauded into continuing coverage.  
25 Have you given Mr. Smith all of the documents that provide the

1 predicate for what you said to me for the last 10 minutes or  
2 not?

3 MR. WALSH: Yes. Also by the way --

4 THE COURT: And to the extent that the investigating  
5 lawyer --

6 MR. WALSH: Hanson.

7 THE COURT: I'm sorry?

8 MR. WALSH: Hanson.

9 THE COURT: Hanson, right, described any of the facts  
10 that he looked at in his investigation in contrast to his legal  
11 views, have you produced that portion of those documents?

12 MR. WALSH: I tell you I produced -- no, not the  
13 reports themselves. I mean -- he's got all the files that we  
14 had and what Hanson had and what Tordie had, you know, but I  
15 didn't produce -- they're kind of intertwined.

16 THE COURT: I know they're intertwined and although I  
17 hate doing it, I do it when I have to which is I need to review  
18 the documents --

19 MR. WALSH: I'd be happy to give them to you.

20 THE COURT: -- and -- in camera and address the  
21 portions that are protected by privilege and those that aren't.  
22 Coincidentally I had to do it in a very case that starts in 15  
23 minutes.

24 MR. WALSH: No, we're happy to do it.

25 THE COURT: All right. So we'll work out a time for

1 that.

2 MR. WALSH: Can I say one more thing before we close?  
3 The witness that we proposed bringing on will be an underwriter  
4 because the underwriter is the one that's interested in the  
5 information, not the claims people, and that's it. I mean I'm  
6 not going to -- I don't intend to bring Fleming. I don't  
7 intend to bring Roberts. I don't intend to bring Hanson or  
8 have an affidavit by Hanson. I don't need any of them. You  
9 know, if an underwriter says -- and I can bring in any  
10 underwriter who writes financial institutions and say would you  
11 deem this to be material underwriting information that should  
12 be disclosed to you? And if he says, yes, that's it. You  
13 know, I don't even have to -- I just show him the testimony in  
14 the record, nothing else, no hidden facts.

15 THE COURT: All right.

16 MR. WALSH: Now, one more thing, Your Honor, before I  
17 finally close. I mentioned -- and maybe this will help solve  
18 things, I mentioned earlier today in a meeting with the  
19 trustee's counsel about the possibility of a mediation and I  
20 thought that maybe -- because it seems to me that this is  
21 vituperative going back and forth with the discovery is maybe  
22 never ending and I thought a mediation with the trustee's  
23 counsel there with the mediator, along with Mr. Smith, may  
24 result in a settlement and may result in a resolution  
25 hopefully, but certainly that would be --

1 THE COURT: By a settlement you mean of the  
2 underlying controversy?

3 MR. WALSH: Yeah, it would -- yeah. So I mean she's  
4 said she would go back to the trustee and take that  
5 recommendation with her. I mean I threw it up as a vehicle to  
6 resolve this.

7 THE COURT: All right. All right. Here's what we're  
8 going to do, folks. First of all on the idea of a mediation I  
9 welcome it. This case has been way to confrontational for way  
10 too long and so you're going to work to try to make that happen  
11 or explain to me why it can't.

12 MR. WALSH: Yeah.

13 THE COURT: On the underlying issues this is what  
14 we're going to do, as a general proposition I agree with Mr.  
15 Smith that if a person, even if a lawyer, does investigating  
16 the merits of a claim, the legal advice he provides by reason  
17 of his investigation is privileged. His attorney mental  
18 impressions are effectively privileged. We don't use the  
19 privilege word, but are fully protected, both the facts that he  
20 discovers as part of it's investigation or that he considers  
21 significant or not privileged. They're merely a work product,  
22 and upon a showing of need which we now have here because  
23 Roberts is difficult to examine, they're going to be produced.

24 So you're going to give me, Mr. Walsh, the reports  
25 and I will authorize you to redact the portions that are in the

1 first two categories and tell you what portions are in the  
2 third category that need to be shared with your opponent.

3 I am sustaining the objection that you raised, Mr.  
4 Walsh, to the need to educate people who don't know anything  
5 about the case to then be deposed as 30(b)(6) witnesses. I  
6 don't slice and dice the extent of knowledge that a prospective  
7 30(b)(6) witness has to have, if he or she has any, but if the  
8 witness would -- is wholly ignorant of the matter I reject the  
9 notion that you then have to educate a witness so that he or  
10 she can testify about something that the witness otherwise  
11 doesn't have anything -- know anything about. You may have to  
12 face the consequences of not having a witness who can't prove  
13 your allegations, but that isn't the same thing.

14 Nobody gets to testify before me unless he or she  
15 gets deposed. So -- and you're going to think long and hard  
16 how you're going to prove the facts upon which you're going to  
17 raise your affirmative defenses, but if you're going to do with  
18 a human being, that human being is going to be deposed. And  
19 for the avoidance of doubt I don't think you quarreled with the  
20 notion that if your opponent wants to examine Roberts your  
21 opponent has that right and he does, and that's whether or not  
22 Roberts testifies.

23 Now, work it out with Mr. Smith the timing under  
24 which you're going to get me the documents and I'll review them  
25 and get to rule on them as soon as my circumstances permit. I

1 have many, many things on my plate. In the meantime deadlines  
2 for completing discovery are tolled. Okay.

3 MR. WALSH: Your Honor, just -- you want the entire  
4 document and then you'll --

5 THE COURT: Whatever you haven't already given to Mr.  
6 Smith --

7 MR. WALSH: I'll send you the entirety.

8 THE COURT: -- that Mr. Smith asked for.

9 MR. WALSH: There's 11.

10 THE COURT: All right.

11 MR. WALSH: Thank you.

12 MR. SMITH: Your Honor, may I do some cleanup?

13 THE COURT: If it's merely cleanup and not rearguing  
14 --

15 MR. SMITH: It is. I'm --

16 THE COURT: -- matters I've already addressed.

17 MR. SMITH: I'm not going to address any of the  
18 merits. As it stands right now we're supposed to have pretrial  
19 briefs to Your Honor on October 18th, whether we -- with a  
20 trial --

21 THE COURT: If any of --

22 MR. SMITH: -- on or after November 1st.

23 THE COURT: -- this stuff is relevant to what you'd  
24 putting in your pretrial brief that's going to have to be  
25 tolled.

1 MR. SMITH: Is it tolled as of now or do we wait  
2 until Your Honor does an in camera review or --

3 THE COURT: Well, your duty to keep working on them  
4 stops for the time being and your duty to submit them stops and  
5 it'll be recalibrated based on when you have the rulings from  
6 me and when you get production of anything that I conclude  
7 should have been produced earlier, but hasn't been.

8 MR. SMITH: Okay. When you say discovery deadlines  
9 are tolled I assume at this point no one is to be noticing any  
10 depositions either or --

11 THE COURT: No, discovery cutoffs are tolled.

12 MR. SMITH: Right, that's what I meant.

13 THE COURT: No, you guys can keep deposing. You can  
14 keep working on discovery as is otherwise appropriate.

15 MR. SMITH: Okay. And one final administrative  
16 question. With pretrial briefs is that when we would submit  
17 motions in limine as well or do you prefer those on first day  
18 of trial?

19 THE COURT: I don't want them the first day of trial.  
20 I want them in advance of that. I normally read and rule on  
21 motions in limine before trial and rule on them either before  
22 trial or at the outset of a trial. I want them early enough so  
23 that I don't have a gun to my head in doing that. I usually  
24 want them a week or two before the trial.

25 MR. SMITH: Okay. Thank you.

1 THE COURT: Okay.

2 MR. WALSH: Your Honor, one more --

3 THE COURT: Yes, Mr. Walsh?

4 MR. WALSH: I can get them to you within two weeks so  
5 that's not a problem, the 11 letters. When you say discovery  
6 is continuing I mean does that --

7 THE COURT: I don't -- I got the impression that Mr.  
8 Smith wants to depose Mr. Roberts.

9 MR. WALSH: Oh, all right.

10 MR. SMITH: I do not, Your Honor.

11 THE COURT: I'm sorry?

12 MR. SMITH: I do not. The person I want to depose is  
13 at this point if I'm limited to --

14 THE COURT: Hanson.

15 MR. SMITH: Hanson, correct.

16 MR. WALSH: Well, Hanson --

17 THE COURT: All right. Well, I mean you have the  
18 right to depose Hanson now, but you might to want to wait and  
19 see what of Hanson's documents I'm allowing --

20 MR. SMITH: I will do that.

21 THE COURT: -- to be disclosed.

22 MR. WALSH: Okay. Thank you.

23 THE COURT: All right. Okay. We're adjourned.

24 Those who are here on GM tell your colleagues that --

25 MR. WALSH: Oh, one more thing, Your Honor. I hate

1 to -- the Kroll report, could we have -- can you give us an  
2 order on that?

3 THE COURT: You made a relevance objection on the  
4 Kroll report, Mr. Smith?

5 MR. SMITH: Well, I made a relevance objection. The  
6 trustee has a privilege objection.

7 THE COURT: Has a what?

8 MR. SMITH: A privilege objection, attorney/client  
9 privilege.

10 THE COURT: I thought Kroll is -- it's Kroll  
11 Associates, right? Aren't they --

12 MR. WALSH: No, it's Kroll Associates. It was  
13 retained by Reifler himself.

14 MR. SMITH: No, it was not.

15 MS. ZAVALKOFF-BABEJ: Actually, Your Honor, the  
16 trustee was asserting a work product privilege as Kroll was  
17 retained by Kramer Levin who was counsel to Pali at that time  
18 in addition to asserting --

19 THE COURT: I think it's unlikely that I'll find it  
20 to be privileged or even work product, but why don't you give  
21 me a copy of it so I can see it and I'll rule on it the same  
22 time as whatever I get from Mr. Walsh.

23 MR. WALSH: Thank you, Your Honor.

24 MR. SMITH: Your Honor, may I address the relevance  
25 issue?

1 THE COURT: I don't see a relevance issue. I see it  
2 as relevant and I assume you contend that it's relevant.

3 MR. SMITH: I do not contend it's relevant. Kroll  
4 wasn't even retained to do this report until July 2008, more  
5 than a year after the application for insurance was submitted.  
6 I don't see how in the world that's relevant. If --

7 THE COURT: Oh, forgive me, it's Mr. Walsh who wants  
8 it.

9 MR. SMITH: Correct.

10 MR. WALSH: Sure, it's relevant as I just said. I  
11 think the Court ought to read it because I think it goes back  
12 to -- and I'm not so sure -- Reifler testified that, you know,  
13 he had concerns going back. I'd like to know the breadth of  
14 the Kroll undertaking. If that was involving facts and  
15 circumstances that Reifler was concerned about between the  
16 transfer of shares from EURAM to Pali it's very relevant.

17 THE COURT: I remember why I thought it was relevant.  
18 I thought the Kroll report would be hearsay. It would not be  
19 admissible itself, but to the extent there were facts that  
20 Kroll discovered that might have also be known by Mr. Reifler I  
21 thought that they might lead to discoverable evidence.

22 MR. WALSH: Thank you.

23 THE COURT: But I will not make a final judgment on  
24 that until you give the report so I can see whether my  
25 instincts are sound or not.

1 MR. SMITH: Well, Your Honor, I will let the trustee  
2 do that because they're the holder of the privilege. I will  
3 say that it was commissioned by Kramer Levin, Pali's counsel,  
4 in the middle of litigation. So to me that seems like --

5 THE COURT: Yes, that's why there's a work product  
6 argument.

7 MR. SMITH: I thought Your Honor said there was no  
8 work product --

9 THE COURT: No, I said that there is a work product  
10 argument which can be blown upon a -- or which can provide a  
11 basis for discovery anyway if there is a suitable showing of  
12 need.

13 MR. WALSH: Thank you, Your Honor.

14 THE COURT: Right.

15 MR. WALSH: That's what I thought you said.

16 THE COURT: Right. All right. We're adjourned.

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C E R T I F I C A T I O N

I, COLETTE MEHESKI, court approved transcriber,  
certify that the foregoing is a correct transcript from the  
official electronic sound recording of the proceedings in the  
above-entitled matter, and to the best of my ability.

*Colette Meheski*

COLETTE MEHESKI

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